

9 Official Opinions of the Compliance Board 273 (2015)

- ◆ **2(E)(3) NOTICE: MEETING ON SHORT AND INADEQUATE NOTICE, WITHOUT EMERGENCY - VIOLATION**
- ◆ **3(C) OPEN MEETING: REQUIREMENT VIOLATED BY CONDUCTING DISCUSSION IN ADVANCE OF SCHEDULED MEETING**
- ◆ **7(D) COMPLIANCE BOARD OPINIONS: NO OPINION ISSUED WHEN BOARD LACKS SUFFICIENT INFORMATION**
- ◆ **7(E) COMPLIANCE BOARD: FAILURE TO RESPOND, VIOLATION**

*Topic numbers and headings correspond to those in the Opinions Index (2014 edition) at http://www.oag.state.md.us/Opengov/Openmeetings/OMCB_Topical_Index.pdf

September 18, 2015

Re: Board of Commissioners,
Housing Authority of Prince George's County
Sabrina B. Wear, Esq. and Alexa E. Bertinelli, Esq., *Complainants*

Complainants Sabrina B. Wear, Esq. and Alexa E. Bertinelli, Esq. allege that the Board of Commissioners of the Housing Authority of Prince George's County ("Board") violated the Open Meetings Act by failing to give timely notice of its "special" meeting on Monday, April 6, 2015, and by meeting secretly to discuss and approve a federally-mandated plan. The Authority's executive director responded on behalf of the Board.

We have consolidated this complaint with a separate complaint submitted by Ms. Wear. That complaint alleges, among other things, that the Board failed to give notice of "special" meetings in 2012 and 2013, met before a public meeting without giving notice, held a teleconference meeting in 2013 without notice, and conducted its business through committees that met without providing notice or adopting minutes. The Board did not respond to that complaint within 45 days after the date our staff sent it. Under those circumstances, we are to decide the matter on the basis of the complaint alone. *See* § 3-206(d).¹

¹ Unless specified otherwise, statutory references are to the General Provisions Article (2014) of the Maryland Annotated Code.

We address these complaints against the backdrop of 9 *OMCB Opinions* 178 (2014).² That opinion involved a “special” meeting that the Board held in August 2014 without giving proper notice. In fact, the Board met that month after stating in its July meeting agenda that it would not meet until September. In its response to that complaint, the Board stated that its notice system “did not contemplate” a special meeting, that the violation was “an inadvertent administrative error,” and that it had since changed its practices. The two complaints now before us suggest instead that, before the 2014 complaint, the Board had regularly held “special meetings” without adequate notice and that the issuance of 9 *OMCB Opinions* 178 has not resulted in a change to its practices.

We again find that the Board has violated the Act by meeting without having first provided the public with reasonable advance notice. We also find that the Board violated the Act by failing to respond to a complaint. As explained below, we are unable to resolve all of the allegations.

Discussion

1. *The April 6, 2015 meeting (the Wear and Bertinelli complaint)*

Under a federal law applicable to the Board’s housing programs, the Board must prepare and adopt an annual plan and submit it to the federal Department of Housing and Urban Development, every year. Among other things, the plan must include for the upcoming fiscal year the Board’s policies on certain matters within the Board’s discretion. 42 U.S.C. § 1437c-1(b), 24 C.F.R. § 903.7. The Board must also submit a five-year plan once every five fiscal years; that plan, too, must include information on the Board’s policies. *Id.* at § 1437c-1(a), 24 C.F.R. § 903.6. There is a public comment period for the plans.

In March 2015, the submissions show, the Board was considering the contents of its annual plan and a five-year plan, both of which it expected to submit in a consolidated submission on April 15. The Board’s agenda for its regularly-scheduled March 23, 2015 meeting predicted: “Special board meeting to approve the Annual Plan [-] proposed date: Week of April 6th.” The Authority’s website did not mention that “special” meeting. Complainants submitted comments on Friday, April 3, within the deadline.

According to the Board, the Board members did not confirm until Friday, April 3, that they would meet on the following Monday at five o’clock to approve the annual plan. At 4:35 p.m. on that Friday—which, we note, was Good Friday and the beginning of Passover—staff sent an email, with a meeting notice to be posted “immediately,” to employees at the

² The opinion is posted at <http://www.oag.state.md.us/Opinions/Open2013/9omcb178.pdf>.

housing offices and the Authority's central office. The notice was not posted on the Authority's website. According to the Board, "staff realized" on Monday morning "that complainants had not been notified and promptly sent an email regarding the meeting." The email attached to the response shows that it was sent to Ms. Wear, the sole addressee, at 11:12 a.m., less than six hours before the meeting. As far as we can tell, the notice was never posted on the Authority's website.

We apply the following standards to assess whether a public body has given the "reasonable advance notice" notice required by the Act:

As for timeliness, we have stated that "the touchstone of 'reasonableness' is whether a public body gives notice of a future meeting as soon as is practicable after it has fixed the date, time, and place of the meeting." 5 *OMCB Opinions* 83, 84 (2006). A public body has not provided "reasonable advance notice" if it knew the deadline by which it needed to meet on a certain matter and delayed setting the date. 5 *OMCB Opinions* 139, 143 (2007). Put another way, when "a meeting is scheduled on short notice, as sometimes will be required by unexpected developments, the person responsible for scheduling [it] must provide the best public notice under the circumstances." 1 *OMCB Opinions* 38, 39 (1993). For example, notice of a meeting one day in advance is insufficient when a public body could have anticipated the need for the meeting earlier. See 5 *OMCB Opinions* at 143.

8 *OMCB Opinions* 76, 80 (2012).

Here, it is clear that the Board did not need to call the April 6 meeting on short notice; it knew at least by March 23 that it would meet during the week of April 6 and simply delayed setting the date, and, anyway, it adopts plans every year. Even had the need to meet been unexpected, the Board hardly provided the best notice under the circumstances.

We therefore find that the Board violated the Act's notice requirement, § 3-302, by meeting on April 6 without having first given notice reasonably in advance. The Board members committed this violation less than four months after the Compliance Board found the same type of violation in 8 *OMCB Opinions* 180. In responding to that complaint, the Board pledged to change its practices. It should not have taken long to implement that change: very simply, if the Board has not given reasonable advance notice of a meeting, it must not meet.

We emphasize that it is the Board members, not the Authority's staff, who have violated the Act. While "an inadvertent administrative error," as the Board claimed last time, perhaps resulted in the failure to post notice, the

violation lies in the fact that the Board members met anyway. We see, in the minutes of the March 23 meeting, that Ms. Wear brought to the members' attention her concern that the notice posted in the waiting area was for the February meeting only. Responding to that concern, a member asked staff to confirm that the Board "compl[ies] with the statutory notice requirements so that we do not have any notice issues." We suggest that the Board begin each meeting with that question.

2. Allegations that the Authority met secretly to discuss its responses to comments submitted by the public (the Wear and Bertinelli complaint)

Complainants state that the Board adopted the plan at the April 6 meeting without much discussion and that the Chair's comments at the meeting suggested that the Board had already discussed the plan. Complainants also state that, although the plan that the Board adopted on April 6 did not contain responses to the comments that they had submitted on April 3, the plan that the Board submitted to the Department of Housing and Urban Development did contain responses. From those facts, Complainants infer that the Board met in secret closed sessions both before and after the meeting on the 6th. The Board responds that it discussed the plans at its March 23 and on April 6 meetings. The Board asserts several times that "[t]here were no decisions made" outside of those meetings.

The Act applies when a quorum meets to consider public business, not just when the public body makes decisions. *See* § 3-301 (requiring public bodies to meet in open session) and § 3-101(g) (a public body "meets" when it "considers" *or* "transacts" public business). The response states that the Chair asked the Board members for their comments by April 3 and that staff and one member incorporated into the plan the Board's responses to public comments. While these facts suggest that the Board did not discuss the plan in a closed session, the response does not directly deny the allegation. From the submissions, we are unable to determine whether a quorum of the Board discussed public business in a setting other than the meetings it scheduled as public meetings.

3. Earlier meetings (the Wear complaint)

Complainant Wear alleges that the Board violated the Act nine times with regard to meetings held from July 2012 to June 2014. We address these allegations on the basis of the complaint and the attached meeting documents, because the Board has not submitted a response. That in itself violates the Act. *See* § 3-206(b) (requiring public bodies to respond to Open Meetings Act complaints).

Some of the allegations involve "special meetings" to approve contracts or agreements (August 1, 2012, despite the announcement of a "recess" in August, and August 23, 2013) or an annual plan (April 5, 2013),

all allegedly without notice to the public. Other allegations involve a retreat in early November 2013 without notice, the practice of holding non-public “pre-meetings” (referred to in the minutes of the January 28, 2013 meeting), and the Board’s approval of a five-year plan in 2014 without meeting publicly. Complainant further alleges that the Board conducts its business through five committees that meet out of the public eye, and she has attached minutes that reflect referrals of matters to various committees and the adoption of committee recommendations.

Because we do not have enough information to resolve these allegations, we will provide the Board with the rules applicable to each and refer the Board to the applicable opinions, which are accessible through the open meetings page on the Attorney General’s website.³ We skip the rules applicable to “special meeting” allegations only because we have covered that ground already. As to the allegations themselves, the Board’s statement to the Compliance Board in 2014 that the Board’s system for publishing notices “did not contemplate” “special meetings” certainly suggests that the Board’s notices for these earlier special meetings were also inadequate.

As to “pre-meetings,” it is a violation of the Act for a quorum to discuss public business in any gathering that is not open to the public, unless the public body is performing a function that is expressly excluded from the Act. In the past, the Compliance Board has expressed some skepticism about what occurs at gatherings described only as “pre-meetings.” *See* 6 *OMCB Opinions* 69, 73 (2009) (“While pre-meetings may consist of matters outside the scope of the Act, we suspect that the opportunity to inquire into proposed agenda items of significant interests and exchanging of substantive information is often the more significant motif why premeetings occur.”). Further, the Compliance Board has long made clear that a discussion among a quorum about what to put on a meeting agenda is itself a meeting subject to the Act. *See* 1 *OMCB Opinions* 157 (1996) (No. 96-3) (city council violated Act by excluding press from lunch meetings where council discussed the agenda for the next meeting). In short, a public body violates the Act when it holds a pre-meeting without notice and discusses its agenda for a public meeting.

The same rules apply to “retreats”: When a quorum is present and discusses public business subject to the Act, the Act applies no matter what the event is called. *See, e.g.,* 3 *OMCB Opinions* 122 (2001) (No. 01-10) (discussing aspects of retreat that were subject to the Act).

Additional rules apply to the allegations that five committees secretly conduct the Board’s business. If those committees are created by a bylaw, as most “standing committees” are, or by a rule, resolution, or provision of law,

³ Our opinions are posted by volume at <http://www.oag.state.md.us/Opengov/Openmeetings/board.htm>.

then they are themselves public bodies subject to the Act. *See* § 3-101(h) (defining “public body”). If they are not public bodies, but their meetings are attended by a quorum of the Board, then those meetings are meetings of the Board itself and must be held in accordance with the Act. *See, e.g.*, 8 *OMCB Opinions* at 79. Whether the Act applies to a particular meeting depends on what function the committee is performing, but the minutes provided to us show that at least one committee discusses matters that fall within the scope of the Act. If it has not done so already, the Board should seek advice on whether the Act applies to its committees.

Conclusion

In sum, we are left with the impression that the Board’s meeting practices have been somewhat uneven. For the second time in the space of nine months, we have found that the Board violated the Act by meeting without having given adequate notice. The Board has also violated the Act by failing to respond to a complaint. Although we were unable to resolve all of the allegations in these two complaints, we have given guidance on the applicable principles.

Under § 3-211, the Board must announce and summarize this opinion and acknowledge receiving it.

Open Meetings Compliance Board

Jonathan A. Hodgson, Esq.
April C. Ishak, Esq.